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THE BITTER WITH THE SWEET: THE IMPACT OF THE WORLD TRADE ORGANIZATION'S SETTLEMENT OF THE BANANA TRADE DISPUTE ON THE HUMAN RIGHTS OF ECUADORIAN BANANA WORKERS

MAXMILLIAN FINLEY

I. INTRODUCTION

On the morning of May 16, 2002, approximately 400 hooded men brutally attacked banana workers on the Los Alamos plantations, owned by the Noboa¹ company in Ecuador.² These workers had been on a legal and non-violent strike since May 6th,³ "protesting for proper working conditions and their rights under Ecuadorian law."⁴ Reports indicate that the hooded men banged on workers' doors, dragged roughly eighty of them from their homes, hit many of them with rifles, looted their homes, and threatened to kill the workers and dump them into the river.⁵ The armed men remained on the plantation into the early evening, at which time

1. Noboa is short for Grupo Noboa, an Ecuadorian banana corporation. The corporation is largest exporter of Ecuadorian bananas and the fourth largest banana company in the world. See US/LEAP, *Banana Workers Campaign: Banana Industry Crisis*, at <http://www.usleap.org/Banana/bananatemp.html#noboa> (last visited 10/24/02). See also Robert Perillo, *Banana Workers and Transnationals: An Industry Crisis*, U.S./Labor Education in the Americas Project (US/LEAP), (October 28, 2000), available at <http://www.usleap.org/Banana/crisis/BananaStudy8-00.html>.

2. The Noboa Corporation is owned by, Álvaro Noboa, who was a leading presidential candidate in Ecuador's October elections. *Two Attack**, Intimidation of Ecuadorian Banana Workers! Noboa Admits to Hiring Armed Thugs*, USLEAP (May 24, 2002), available at <http://www.usleap.org/Banana/Noboa/TwoAttackUpdate5-24-02.html>.

3. See *Armed Men Attack Ecuadorian Banana Workers Organizing For Their Basic Right*, Banana Link, at http://www.bananalink.org.uk/trade_war/trade_war.htm (17 May 2002) (last visited 11/25/02).

4. See Constitución Política de la Republica de Ecuador, 1998, Article 35(9). [Political Constitution of Ecuador, 1998], available at <http://www.georgetown.edu/pdba/Constitutions/Ecuador/ecuador98.html>. [Hereinafter Constitution]; Codificación del Código del Trabajo, Articles 447, 467 [National Code of Labor], available at <http://natlex.ilo.org/txt/S97ECU01.htm>. [Hereinafter Labor Code]. See also Ecuador: Escalating Violence Against Banana Workers, Human Rights Watch, (May 22, 2002) at <http://www.hrw.org/press/2002/05/ecuador0522.htm>.

5. See Ecuador: Escalating Violence Against Banana Workers, Human Rights Watch, May 22, 2002 at <http://www.hrw.org/press/2002/05/ecuador0522.htm>.

they purportedly told all striking workers to "leave the premises by 6:30 P.M. or be forcibly evicted."⁶ Shortly after 6:00 P.M., with the workers showing no sign of leaving, the armed men allegedly began shooting, critically injuring one worker, "and causing the subsequent amputation of that worker's leg. Several others, including a police officer, were also injured."⁷ Reports indicate that at 8:00 P.M., police reinforcements finally arrived and arrested approximately twenty of the armed thugs.⁸ This violence came almost a year after the Dispute Settlement Resolution⁹ in the banana trade sector between the European Union¹⁰ and United States.¹¹ This circumstance is just one example of a reoccurring theme for Ecuadorian banana unions, as it becomes apparent that the workers lack the power to negotiate for proper working conditions.¹²

6. See Human Rights Watch, Ecuador: Escalating Violence Against Banana Workers, *supra* note 5.

7. See Banana Link, *supra* note 3.

8. See Human Rights Watch, Ecuador: Escalating Violence Against Banana Workers, *supra* note 5.

9. "The WTO's procedure for resolving trade quarrels under the Dispute Settlement Understanding is vital for enforcing the rules and therefore for ensuring that trade flows smoothly. A dispute arises when a member government believes another member government is violating an agreement or a commitment that it has made in the WTO. The authors of these agreements are the member governments themselves [and] the agreements are the outcome of negotiations among members. Ultimate responsibility for settling disputes also lies with member governments, through the Dispute Settlement Body." See World Trade Organization (WTO), Dispute settlement, available at http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#negotiations (last visited Jan. 31, 2004).

10. "The European Union (EU) was set up after the 2nd World War. The process of European integration was launched on May 9, 1950 when France officially proposed to create 'the first concrete foundation of a European federation'. Six countries (Belgium, Germany, France, Italy, Luxembourg and the Netherlands) joined from the very beginning. Today, after four waves of accessions (1973: Denmark, Ireland and the United Kingdom; 1981: Greece; 1986: Spain and Portugal; 1995: Austria, Finland and Sweden) the EU has 15 Member States and is preparing for the accession of 13 eastern and southern European countries." See TakingItGlobal, *The European Union On-Line*, at <http://www.takingitglobal.org/opps/orgdir.html?vieworg=2447> (last visited Sept. 11, 2003).

11. On April 11, 2001, the U.S. Government and the European Commission reached an agreement to resolve their long-standing dispute over bananas. IP/01/562, April 11, 2001 at http://europa.eu.int/comm/external_relations/us/news/ip_01_562.htm (last visited Sept. 11, 2003).

12. See Human Rights Watch, Ecuador: Escalating Violence Against Banana Workers, *supra* note 5.

This note examines the ramifications of the World Trade Organization's Dispute Settlement of the banana trade war on Ecuadorian banana workers. The growing labor rights issues of Ecuadorian banana workers necessitate the United States to take action for the sake of human rights and international democracy. Part II of this Note discusses the history of the banana trade dispute, and the final banana dispute settlement.¹³ Part III examines the effects of increased production in Ecuador on banana workers, the Ecuadorian government's discouragement in the association of labor unions, and the blind eye shown by U.S. multinationals¹⁴ towards worker's human rights in this area.¹⁵ Part IV examines how the U.S. government could protect Ecuadorian workers using current U.S. trade policy and U.S. and international law. These measures would enable workers to bring suit against the multinational corporations that are aiding in the denial of their human rights, or would encourage change by the Ecuadorian government through denial of federal aid and trade benefits from the US. Part V concludes that the Ecuadorian labor situation is similar to the U.S. past labor situation, and that history shows U.S. how important free association and labor conditions are to democracy.

II. THE BANANA TRADE

A. *The History*

The European Union (EU) is a very significant player in the world banana trade.¹⁶ The EU imports more agricultural goods

13. The formal name given to the dispute settlement by the WTO is "US import measures on EC products — *Brought by EC* DS165." World Trade Organization, *Dispute Settlement – Index of Dispute Issues*, available at http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#bkmk9 (last visited Jan. 1, 2004).

14. Multinational enterprises are companies which own or control production, distribution, services or other facilities outside their base country, whether they are of public, mixed or private ownership. See *International Guidelines - Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, International Labor Organization (Nov. 1977), available at <http://www.ilo.org/public/english/employment/gems/eo/inter/ilo.htm>.

15. See *Tainted Harvest: Child Labor and Obstacles to Organizing on Ecuador's Banana Plantations*, Summary Human Rights Watch, (April 2002), at http://hrw.org/reports/2002/ecuador/ecuad0402-01.htm#P239_15845.

16. The European Union estimated imports of bananas in 2001 is 3169 thousands tons, which is second largest amount of import only to the US. *Bananas: Commodities Notes, Final Results of 2001*, Food and Agriculture Organization of the United Nations,

from developing countries than the U.S., Japan, Canada, Australia and New Zealand combined¹⁷ and imports about a third of all traded bananas.¹⁸ In fact, the EU is the only major banana market in the world that has any tariffs and limits on volumes imported.¹⁹ Thus, EU policies²⁰ have a major impact on the world trade in bananas.²¹

Although the EU has a major impact on the banana trade, the three biggest banana producing companies - Chiquita, Dole and Del Monte - together produce and control over two thirds of world exports,²² allowing them to control the market and set the rules for

Economic and Social Department (ES), Commodities and Trade Division (ECS), available at http://www.fao.org/es/esc/en/20953/20987/highlight_28367en.html (last updated Oct. 2002).

17. *Facts and Figures on EU Trade in agricultural products: open to trade, open to developing countries*, EU Institution Press Release, MEMO/02/296, (12/16/2002), available at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=MEMO/02/296—0—RAPID&lg=EN&display=.

18. The projected net imports of bananas for the European Union for 2005 are 3411 thousand tons. The total estimated imports for all developed nations during that same period is 10,642 thousand tons. *Projection for supply and demand of Bananas to 2005*, Food and Agriculture Organization of the United Nations, 1st Sess., Committee On Commodity Problems, Intergovernmental Group on Bananas and on Tropical Fruits, U.N. Doc. CCP: BA/TF 99/5, available at <ftp://ext-ftp.fao.org/waicent/pub/ccp/bntf99/X1065e.pdf> (last visited Sept. 11, 2003).

19. The U.S. and Japan, the next two largest markets, allow bananas in freely, without any tariffs and without limits on volumes imported. See *Id.* See also *Bananadrama 1: The EU Banana Regime*, Banana Link, at <http://www.bananalink.org.uk/trade/btrade.htm> (last visited Jan. 1, 2004).

20. One of the major EU policies is the General System of Preferences (GSP). "A total of 142 developing countries benefit from the extensive EU preferences under the recently enhanced GSP. In addition, 77 Africa Caribbean and Pacific countries (ACPs) also benefit from preferential access to the EU market (more than 80% of African exports enter the EU at preferential or zero rates). Furthermore, the EU has concluded free trade agreements with a number of developing countries (these agreements have been made with Mexico, South Africa and Mediterranean countries). This preferential access is reflected in the much higher level of exports from these countries to the EU, compared to other Quad members." EU Institution Press Release, *Facts and figures on EU Trade*, *supra* note 17.

21. *Bananadrama 1: The EU Banana Regime*, Banana Link, at http://www.bananalink.org.uk/trade_war/trade_war.htm (last visited Jan. 25, 2004).

22. *Companies: Banana Companies*, Banana Link at <http://www.bananalink.org.uk/companies/companies.htm>. Estimates in 1997 had Dole controlling 26% of world exports, Chiquita at 25%, and Del Monte at 15%. See Adelen van de Kastelee, *The Banana Chain: The macro economics of the Banana Trade*, International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (1998),

trading.²³ Despite the increase in pressure from some of the major consuming countries to limit their power,²⁴ these companies still have a very strong influence over the market because of their export sales.²⁵ Multinationals are extremely powerful in exporting countries, as they drive exporting countries competing with one another for the multinational favor,²⁶ forcing governments to implement and accept impositions with regards to taxes, tariff preferences, preferential access to loans, and deregulation of social and environmental policies.²⁷

Multinationals also have a strong influence in industrialized countries on the implementation of food and trade policies.²⁸ An example of one multinational's power is Chiquita, which strongly influenced the formal application filed by the U.S. against the EU's banana import regime²⁹ to the World Trade Organization in

available at <http://www.bananalink.org.uk/documents/The%20Banana%20Chain%20by%20A%20van%20de%20Kastele.doc> (last visited Jan. 22, 2004).

23. *Companies: Banana Companies*, Banana Link at <http://www.bananalink.org.uk/companies/companies.htm> (last visited Jan. 22, 2004).

24. *Id.* Major consuming countries, such as the EU countries, try to limit and alter the multinational's power and behavior through these countries own codes of conduct, legislation and campaigns.

25. *Id.* The total banana export revenue of the main African, Caribbean, Pacific countries, for instance, is equivalent to 10% of Chiquita's sales. The total projected amount of export in bananas from the ACP countries is 1037 thousand tons. See also EU Institution Press Release, *Facts and figures on EU Trade*, *supra* note 17.

26. See Daniel T. Griswold and Aaron Lukas, *Cato Handbook for the 106th Congress, Chapter 56, Trade Sanctions*, pg. 555, available at <http://www.freetrade.org/pubs/handbook/hb106-56.pdf>. There is belief by some that foreign direct investment is not only profitable for American shareholders, but that it also helps foster greater economic growth in less developed nations. American companies introduce new technologies and production methods, while raising wages and labor standards. That creation of wealth helps to advance social, political, and economic institutions that are independent of the ruling authorities. (last visited Jan. 22, 2004).

27. *Bananadrama 1: The EU Banana Regime*, *supra* note 21.

28. During the Clinton Administration, the U.S. imposed trade sanctions against the EU during the banana dispute. Carl Lindner, president of Chiquita Banana and a major campaign contributor, proposed these sanctions. Shannon Jones, U.S. *imposes tariff sanctions on European luxury goods*, The International Committee of the Fourth International, March 1999, available at <http://www.wsws.org/articles/1999/mar1999/trad-m05.shtml>; Michael Weisskopf, *Going Bananas: Chiquita's Slippery Influence; The Busy Back-Door Men*, Time, Mar. 31 1997, at 40.

29. *Bananadrama 1: The EU Banana Regime*, *supra* note 21. ("In order to manage the volume of bananas entering the market, the European Union fixed quotas for the different production zones. For imports in excess of the volumes fixed in these quotas, exports incurred a prohibitive tariff to prevent oversupply.

1995.³⁰ This course of action taking by the U.S. eventually led to the "Banana War", and demonstrates Chiquita and other multinationals' persuasiveness in industrialized countries.³¹

B. *The Banana Trade War*

A crisis had been brewing in the world trade market since 1993 when the EU imposed a new quota system (the "banana regime") for banana imports for the purpose of managing the European Market.³² The EU had several objectives when they implemented this system: to harmonize the various pre-1993 national regimes; to protect banana production in EU member states; to supply European consumers with 'reasonably' priced bananas; to respect European obligations towards Africa, Caribbean, Pacific³³ countries, as defined by the Lomé Convention,³⁴ in order to support the eco-

The annual ACP banana quota allowed the 12 'traditional' African and Caribbean producer countries to export, tariff-free, up to a maximum annual volume of 857,700 tons - the equivalent of their cumulated, best annual exports before 1992. Volumes were to be allocated to each of the twelve according to a system of licenses, which is an authorization to import for which the trading company applied. The European Commission issues these licenses free of charge.

The annual quota for dollar bananas was initially set at 2 million tons with a tariff of 100 euros per ton. Following negotiations in 1994, the EU with four producer countries signed the so-called Framework Agreement: Costa Rica, Colombia, Nicaragua and Venezuela. The dollar quota was raised to 2.1 million tons (then 2.2 million tons the following years) and the tariff was reduced to 75 euros per ton. The four countries were allocated almost 50% of the import licenses. Additionally, importing companies needed an export certificate delivered by the exporting country authorities and an import license specific to the country of origin. Although granted free by the European Commission in function of the type of operator, a semi-legal trade developed between import companies - due to the fact that importers would like to sell more bananas on the EU market than the regime allowed them to import.").

30. *Bananadrama 1: The EU Banana Regime*, *supra* note 21.

31. *Bananadrama 1: The EU Banana Regime*, *supra* note 21.

32. *Bananadrama 1: The EU Banana Regime*, *supra* note 21.

33. *Bananadrama 1: The EU Banana Regime*, *supra* note 21. ACP stands for the group African, Caribbean, Pacific countries that signed the Lomé Convention with the European Union.

34. *Bananadrama 1: The EU Banana Regime*, *supra* note 21. ("The Lomé Convention was a trade and aid agreement that the EU signed in 1975 with 48 of its ex-colonies. These preferential trade arrangements permitted duty-free access for a range of commodities on which the economies of the ex-colonies are extremely dependent. From July 1993 until February 2000, 12 ACP countries that traditionally exported bananas to the EU market benefited from duty-free access to the EU market under the so-called 'Banana Protocol' of the Lomé Convention.").

conomic development of these countries; and to reconcile international obligations (notably under GATT³⁵) with national interests.³⁶ However, the tariffs on the non-ACP countries by the EU's banana regime created an oversupply of bananas that affected the remainder of the industry.³⁷ Much of this surplus could be traced to Ecuador, which accounts for 34 percent of world banana exports and is the world's largest banana exporter.³⁸

As an immediate response to the oversupply, U.S. multinational companies increased exports to the U.S., while seeking new markets in the "emerging economies" of Eastern Europe, Russia and Asia.³⁹ For a time, these new markets were able to absorb large quantities of export bananas that could no longer be sold to the EU.⁴⁰ However, the economic crises in Asia and Russia in 1998 caused banana exports to these areas to drop dramatically.⁴¹ By

35. See CIESIN Thematic Guide on Political Institutions and Global Environmental Change, *General Agreement on Tariffs and Trade*, at <http://www.ciesin.org/TG/PI/TRADE/gatt.html> ("The General Agreement on Tariffs and Trade (GATT) was first signed in 1947. The agreement was designed to provide an international forum that encouraged free trade between member states by regulating and reducing tariffs on traded goods and by providing a common mechanism for resolving trade disputes. GATT membership now includes more than 110 countries.").

36. *Bananadrama 1: The EU Banana Regime*, *supra* note 21.

37. *Bananadrama 1: The EU Banana Regime*, *supra* note 21.

38. See Bob Perillo, *The Industry Crisis and Latin American Workers*, U.S./Labor Education in the Americas Project (US/LEAP), (October 28, 2000), available at http://members.tripod.com/foro_emaus/Banana_Crisis.htm (last visited 1/22/04). Ecuador accounts for 34 percent of the world banana supply and is the largest exporter of bananas. See *Projection for supply and demand of Bananas to 2005*, Food and Agriculture Organization of the United Nations, 1st Sess., Committee On Commodity Problems, Intergovernmental Group on Bananas and on Tropical Fruits, U.N. Doc. CCP: BA/TF 99/5, available at <ftp://ext-ftp.fao.org/waicent/pub/ccp/bntf99/X1065e.pdf>. See also, *Banana Commodity Notes: Final Results of the 2002 season*, Food and Agriculture Organization of the United Nations, available at http://www.fao.org/es/esc/en/20953/20987/highlight_28367en.html.

39. *Bananadrama 1: The EU Banana Regime*, *supra* note 21.

40. See Perillo, *supra* note 38.

41. *Id.* In 1998, Russia went through a series of economic pitfalls that put its economy in a serious crisis. See also *Turmoil in Russia: Chronology of a Crisis*, CNN.com at <http://www.cnn.com/SPECIALS/1998/09/crisis.russia/index.html>; During the same year, Indonesia, South Korea, Malaysia, the Philippines, Singapore and Thailand also went through economic turmoil as these market sought to stabilize their economies. See also *Japan pledges \$30 billion to aid Asian economies as G7 meets*, CNN.com, Oct. 3, 1998 at <http://www.cnn.com/WORLD/europe/9810/03/g7.meeting.01/index.html>.

mid 1999, the industry was clearly facing a structural oversupply without historical precedent.⁴²

In 1996, a little more than a year after the establishment of the World Trade Organization (WTO)⁴³, there were five countries – Honduras, Guatemala, Ecuador, Mexico and the United States – that lodged a complaint against certain elements of the banana regime which they considered ‘discriminatory’ to their interests⁴⁴. The United States, involved on behalf of their multinational companies, was especially keen to increase its access to the European market.⁴⁵ Ecuador also claimed that they had insufficient access to the European market.⁴⁶

A panel report issued by the WTO on September 9, 1997, agreed that the EU banana regime was discriminatory and ordered the import regime amended.⁴⁷ The WTO’s appellate body affirmed the panel’s conclusions in October 1997.⁴⁸ In an attempt to comply with the WTO ruling, the EU revised its banana importa-

42. Perillo, *supra* note 38. See also Robert Perillo, *Banana Workers and Transnationals: An Industry Crisis*, U.S./Labor Education in the Americas Project (US/LEAP), (Oct. 28, 2000), at <http://www.usleap.org/Banana/crisis/BananaStudy8-00.html>.

43. The World Trade Organization (WTO) was setup in January 1995 to promote trade liberalization which had been an agenda pursued by the General Agreement on Tariffs and Trade (GATT). *World Trade Organization, WTO*, Banana Link, at http://www.bananalink.org.uk/trade_war/trade_war.htm (last visited Nov. 25, 2002).

44. *Bananadrama 2: Challenges to the EU Banana Regime*, Banana Link, at http://www.bananalink.org.uk/trade_war/trade_war_main2.htm#chal (last visited Feb. 25, 2002). (“When a complaint is filed with the WTO, the WTO’s Dispute Settlement Body (DSB) sets up a Special Group to resolve these complaint. This group is a panel of experts whose role it is to determine whether the policy challenged by the plaintiffs is compatible or not with the base principles of the WTO. This Special Group – or Panel – can summon any country, directly concerned or not, to appear before its experts.”)

45. See *Id.*

46. See *Id.*

47. *European Communities-Regime for the Importation, Sale and Distribution of Bananas: Ecuador’s Complaint: Report of the Panel*, WTO Doc. WT/DS27/R/ECU, May 22, 1997.

48. “The WTO found that among the violated provisions were GATT Article XIII:1, which states that a country may not restrict the importation of a product from one member without similarly restricting importation of that product from all other members, and the Most Favored Nation clause, Article I:1, which requires that any ‘advantage, favor, privilege or immunity’ granted to one country with respect to a certain product be granted to all member countries with respect to that product.” *Tainted Harvest: Child Labor and Obstacles to Organizing on Ecuador’s Banana Plantations, Banana Exports and Trade Regimes*, Human Rights Watch, (April 2002), available at http://www.hrw.org/reports/2002/ecuador/ecuad0402-07.htm#P1015_257403. See also *European Communities-Regime for the Importation, Sale and Distribution of Bananas: Report of the*

tion regime in January 1999.⁴⁹ The new system continued to rely on tariff-rate quotas⁵⁰ and complex licensing schemes, but also allocated over 90 percent of non-ACP country quotas to the "substantial suppliers" of EU bananas.⁵¹ Ecuador received 26.2 percent, Costa Rica 25.6 percent, Colombia 23.0 percent, and Panama 15.8 percent.⁵² However, these changes to the banana regime scheme were found to continue to violate the WTO. In April 1999, the WTO authorized the United States to impose trade sanctions of \$191 million against the European Union.⁵³ In March 2000, Ecuador also sought and obtained authorization to impose sanctions but abstained from using them.⁵⁴

C. *The Dispute Resolution*

On April 11, 2001, after protracted negotiations, the U.S. and the EU agreed on a new EU banana importation regime.⁵⁵ The U.S. agreed to suspend sanctions and worked to secure WTO authorization for the agreement.⁵⁶ Through a two-stage process shifting tariff-rate quotas and licensing allocations based on companies' histories of supplying the EU and their import/export practices,⁵⁷ the new importation scheme was designed to phase in a tariff-only

Appellate Body, WTO Doc. WT/DS27/AB/R, Sept. 9, 1997, pp. 162-63. *Ibid.*; GATT, Articles XIII:1, I:1.

49. Press Release, *European Union News Release*, April 11, 2001, *supra* note 11.

50. Tariff Rate Quotas (TRQ) provide for imports at a favorable tariff up to a given limit. Beyond these limits imports are unlimited, although they are subject to higher tariffs. This is not a quota because a quota restricts imports to a given quantity, and TRQ don't limit trade. EU Institution Press Release, *Facts and figures on EU Trade*, *supra* note 17.

51. See *Tainted Harvest: Child Labor and Obstacles to Organizing on Ecuador's Banana Plantations, Banana Exports and Trade Regimes*, Human Rights Watch, (April 2002), available at http://www.hrw.org/reports/2002/ecuador/ecuad0402-07.htm#P1015_257403.

52. *Id.*

53. EU Institution Press Release, *Facts and figures on EU Trade*, *supra* note 17.

54. Eliza Patterson, "The U.S.-E.U. Agreement to Resolve the Banana Dispute," *ASIL Insight: U.S.-E.U. Banana Dispute Agreement*, April 2001, available at <http://www.asil.org/insights/insigh69.htm>.

55. Press Release, *European Union News Release*, April 11, 2001, *supra* note 11.

56. See Press Release, *European Union News Release*, April 11, 2001, *supra* note 11. The United States lifted sanctions on July 1, 2001. See also "USTR Removes Duties on E.U. Goods Imposed in Banana Dispute," *Market News International*, July 2, 2001 at 2001 WL 24094930.

57. Press Release, *European Union News Release*, EU and Ecuador Reach Agreement to Resolve WTO Banana Dispute, Apr. 30, 2001, available at <http://europa.eu>.

system by 2006.⁵⁸ Until 2006, however, traditional ACP countries will continue to have their own tariff-rate quota and licensing preferences, but all individual country quotas will be abolished.⁵⁹

After initially objecting to this plan, Ecuador reached an agreement with the EU which addressed Ecuador's primary concerns.⁶⁰ A system was designed for allocating import licenses to protect Ecuadorian small and medium producers' license access.⁶¹ In return, Ecuador forfeited its right to impose sanctions on the EU and abandoned its efforts to prevent the European Union from obtaining a WTO waiver in order to allow temporary preferential treatment of ACP countries.⁶² Under the tariff-only system scheduled to begin in 2006, Ecuador will compete freely against other banana-producing countries for access to the EU market, as it does now for the U.S. market access.⁶³ The success of the dispute settlement was visible immediately, as the Ecuadorian government statistics indicated that imports from Ecuador into the EU had increased since the implementation of the reformed EU banana regime in July 2001.⁶⁴

III. THE CONSEQUENCES OF THE TRADE DISPUTE RESOLUTION

Although this dispute resolution should result in increased profit for Ecuador,⁶⁵ it will equate to nothing for banana workers if the Ecuadorian government⁶⁶ and multinationals benefiting from

int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/627—0—AGED&lg=EN&display=.

58. Patterson, *supra* note 54.

59. Press Release, European News Release, April 30, 2001, *supra* note 57.

60. Press Release, European News Release, April 30, 2001, *supra* note 57.

61. See Press Release, European News Release, April 30, 2001, *supra* note 57. See also Human Rights Watch *Supra* note 15 n.386, citing: *Commission Approves Banana Regs. After Settling with Ecuador*, Inside U.S. Trade, May 4, 2001, at 19. (Dole, Ecuador's second largest exporter, had also objected to the licensing scheme because license allocation, until December 2003, is to be based on E.U. market share between 1994 and 1996, a period during which Dole's importation of Ecuadorian bananas in the European Union was significantly lower than in later years).

62. Press Release, European News Release, April 30, 2001, *supra* note 57.

63. *Bananadrama 2: Challenges to the EU Banana Regime*, *supra* note 44.

64. *Bananadrama 2: Challenges to the EU Banana Regime*, *supra* note 44.

65. *Bananadrama 2: Challenges to the EU Banana Regime*, *supra* note 44.

66. *Complaint Against the Government of Ecuador presented by the IUF and CEOLS*, International Labor Organization, available at <http://www.oit.org.pe/sindi/english/casos/ecu/ecu200202.html>. IUF filed a formal complaint against the government of Ecuador with the Committee on Freedom of Association of the ILO.

the workers' labor continue to deny workers their basic human rights to form and organize unions.⁶⁷

Unions⁶⁸ work to unite employees of a company to solve problems and gain protection against unfair treatment.⁶⁹ An employer can mistreat a small number of employees easily. However, when all the employees unite, they can stand up to their employer without fear of getting fired or demoted.⁷⁰ Workers in unions counter-balance the unchecked power of employers⁷¹ and help remedy discrimination because union contracts ensure that all workers are treated fairly and equally.⁷² Without a union, workers are left without a voice on the job to improve their lives, their families, their communities and their working conditions.⁷³

The International Covenant on Civil and Political Rights declares that "everyone shall have the right to freedom of association with others, including the right to form and join trade unions for

67. See International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, Article 22, Section 1, *entered into force* Mar. 23, 1976, available at <http://www1.umn.edu/humanrts/instree/b3ccpr.htm>. See also I International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316, 993 U.N.T.S. 171, Article 8(1)(a), *entered into force* January 3, 1976, available at <http://www1.umn.edu/humanrts/instree/b2esc.htm>. Both the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights state that everyone has a right to form a union. See also *Banana workers strike against race to the bottom*, Global Exchange, available at <http://www.globalexchange.org/economy/bananas/>. In Ecuador temporary subcontracted laborers are not allowed to form unions and are earning an average of less than \$2 a day.

68. See *How and why people form unions*, AFL-CIO, available at <http://www.aflcio.org/aboutunions/joinunions/>. A union is a group of workers who come together to win respect on the job, better wages and benefits, more flexibility for work and family needs, and a voice in improving the quality of their products and services.

69. See *The benefits of a union*, Canadian Union of Public Employees, available at <http://www.cupe.ca/joining/whyunionswork/showitem.asp?id=1534>.

70. See *id.*

71. See AFL-CIO, *supra* note 68.

72. See AFL-CIO, *supra* note 68.

73. See AFL-CIO, *supra* note 68. See also *Human and Environmental Cost, Human Impact*, Banana Link, available at <http://www.bananalink.org.uk/impact/impact.htm> (last visited Jan. 25, 2004). (Mentioning that poor living conditions, low wages, long exhausting hours, serious health hazards, child labor, sexual harassment are all other human rights concerns are a direct result of a lack of a union to protect workers against such violations).

the protection of his interests.”⁷⁴ It also states that “nothing in this article shall authorize States to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice the guarantees provided for in that Convention.”⁷⁵ The International Covenant on Economic, Social and Cultural Rights also provides workers with: “The right to form trade unions with no restrictions”;⁷⁶ “The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society”;⁷⁷ and “The right to strike, provided that it is exercised in conformity with the laws of the particular country.”⁷⁸ Both the International Labor Organization Convention concerning Freedom of Association⁷⁹ and the Universal Declaration of Human Rights declare that banana workers have the right to associate and to form a union.⁸⁰ The absences of these rights expose banana workers to an even longer list of concurrent problems with greater human rights concerns.⁸¹

74. International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, Article 22, Section 1, *entered into force* Mar. 23, 1976, available at <http://www1.umn.edu/humanrts/instree/b3ccpr.htm>. See also *Status of Ratifications of the Principal International Human Rights Treaties*, Office of the United Nations High Commissioner For Human Rights, (Nov. 2, 2003) available at <http://www.unhchr.ch/pdf/report.pdf> (Ecuador ratified the ICCPR on Mar. 23, 1976).

75. International Covenant on Civil and Political Rights G.A., Article 22, Section 3.

76. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316, 993 U.N.T.S. 171, Article 8(1)(a), *entered into force* January 3, 1976, available at <http://www1.umn.edu/humanrts/instree/b2esc.htm>. See also *Status of Ratifications of the Principal International Human Rights Treaties*, Office of the United Nations High Commissioner For Human Rights, (November 2, 2003) available at <http://www.unhchr.ch/pdf/report.pdf> (Ecuador ratified the ICESCR on Jan. 3, 1976).

77. International Covenant on Economic, Social and Cultural Rights, Article 8(1)(c).

78. International Covenant on Economic, Social and Cultural Rights, Article 8(1)(d).

79. See ILO Convention concerning Freedom of Association and Protection of the Right to Organize (ILO No. 87), 68 U.N.T.S. 17, July 4, 1950, Article 2, 3 and 4. ILO Convention No. 87 was ratified by Ecuador on May 29, 1967, available at <http://unhchr.ch/html/menu3/b/s-1/087.htm>.

80. See Universal Declaration of Human Rights G. A. res 217 A (III), 10 December 1948, Article 23 (4) available at <http://www1.umn.edu/humanrts/instree/bludhr.htm>.

81. See also *Human and Environmental Cost, Human Impact*, Banana Link, available at <http://www.bananalink.org.uk/impact/impact.htm> (*last visited* Nov. 25, 2002).

While banana production in Central America, Panama and Colombia is often unionized, less than 1 percent of Ecuador's banana workers belong to a union.⁸² Wages for Ecuadorian banana workers are considerably lower than those of unionized banana workers elsewhere.⁸³ Additionally, the numerous social benefits that banana unions in other countries have won for their members through long struggles are almost entirely absent in Ecuador's banana sector.⁸⁴

A. *The Ecuadorian Government*

While the Ecuadorian Constitution⁸⁵ and Labor Code⁸⁶ guarantees the right to organize, it does not require reinstatement of workers fired for union activity.⁸⁷ Instead, an employer need only pay a relatively small fine for an anti-union dismissal, less than \$400

82. See David Bacon, *Blood on the Bananas*, Jun. 12, 2002, at http://www.kclabor.org/blood_on_the_bananas.htm. "Over 90% of the banana workers in Colombia and Panama belong to unions and 40% in Guatemala. Only Costa Rica's 6% approaches Ecuador's miniscule 1% of banana workers (1650 people) who are organized." See also *Tainted Harvest: Summary*, Apr. 2002, *supra* note 15.

83. "In many countries such as Colombia, Costa Rica, and Panama, workers have struggled to form unions and raise wages to as much as \$11 a day. But in Ecuador temporary subcontracted laborers are not allowed to form unions and are earning an average of less than \$2 a day. Workers around the world are experiencing significant roll-backs due to the continuing crisis in the banana industry." *Banana workers strike against race to the bottom*, Global Exchange, at <http://www.globalexchange.org/economy/bananas/>.

84. See Perillo, *supra* note 40. (These social benefits include health care, housing, electricity, potable water, education for their children). See also *Global Commodities: Bananas, Coffee*, Rural Migration News, October 2002, Volume 8, Number 4, at http://migration.ucdavis.edu/rmn/more.php?id=630_0_5_0. In 2000, banana workers earned from \$60 a month in Ecuador to \$150 to \$200 in Honduras and \$200 to \$300 a month in Colombia.

85. See Constitution, Article 35(9), available at <http://www.georgetown.edu/pdba/Constitutions/Ecuador/ecuador98.html>.

86. Labor Code, Articles 447, 467, available at <http://natlex.ilo.org/txt/S97ECU01.htm>; see also ILO Convention, *supra* note 79.

87. Human Rights Watch, *supra* note 15. See also Labor Code, Article 626, available at <http://natlex.ilo.org/txt/S97ECU01.htm>. See also Mariano Cortes, Fernando Delgado, Alvin Hilaire, Gabreila Inchauste, Werner Keller, Erick Offerdal, and Mayra Zermeno, *Ecuador: Selected Issues and Statistical Annex*, IMF, Country Report No. 00/125, October 18, 2000, p. 57, available at <http://www.imf.org/external/pubs/ft/scr/2000/cr00125.pdf>. The IMF has noted that the enforcement of minimum wages in Ecuador is weak, "since the punishment for noncompliance with labor legislation is relatively low."

in most cases involving a banana worker.⁸⁸ In Ecuador, most large-scale producers employ a system of temporary contract labor that severs the formal link between employer and employee.⁸⁹ Work teams, or "cuadrillas," consisting of 12 to 15 workers which are paid by the day or by the task.⁹⁰ The team leader, or "jefe de cuadrilla," may in fact be a formal employee of the plantation, but he contracts the rest of the "cuadrilleros."⁹¹ This is how many banana workers drop to the title of "non-union workers." As temporary workers they do not fall under labor legislation and are generally excluded from all social security, employment, and health care benefits.⁹²

Ecuador's refusal to impose its own Labor Code provisions that govern labor contracts along with the ambiguity of those provisions allows employers to create a defenseless "permanent temporary" workforce in the banana sector.⁹³ The lack of enforcement is what allows for "the informal use of consecutive contracts and multiple project contracts."⁹⁴ Short term contracts are run in succession, one after the other, for many months or years on end, which creates an unstable "permanent temporary" workforce.⁹⁵ The problem with creating a work force like this is that these workers are not entitled to benefits due to employees recognized as permanent in the eyes of the law, and their employers are not bound by Labor

88. Human Rights Watch, *Summary*, *supra* note 15. See Labor Code, Article 626, available at <http://natlex.ilo.org/txt/S97ECU01.htm>.

89. Human Rights Watch, *Summary*, *supra* note 15. ("The Labor Code also permits the use of temporary contracts, not to exceed thirty days, for workers hired to attend to emergencies or extraordinary business needs that, unlike the everyday processing or field activities of banana workers, are *not* linked to the normal activity of the employers. Seasonal contracts may also be used to hire workers for cyclical labor and are understood to create the right for such workers to be hired back the following cycle or season. As banana production in Ecuador is not cyclical and, instead, involves the performance of all phases of production activity year-round, seasonal contracts are generally not used in the sector."). See also Labor Code, Article 17, available at <http://natlex.ilo.org/txt/S97ECU01.htm>.

90. See Perillo, *supra* note 38.

91. See Perillo, *supra* note 38.

92. See Perillo, *supra* note 38; See also Labor Code, Articles 14, 16, available at <http://natlex.ilo.org/txt/S97ECU01.htm>.

93. Human Rights Watch, *Summary*, *supra* note 15.

94. Human Rights Watch, *Summary*, *supra* note 15.

95. Human Rights Watch, *Summary*, *supra* note 15.

Code provisions that prohibit anti-union dismissals.⁹⁶ If the temporary workers are suddenly told not to return to work the following day or week, they have not technically been fired; they have simply not been rehired.⁹⁷ As such, the Labor Code does not explicitly prohibit anti-union discrimination in rehiring.⁹⁸

The use of subcontracted labor has also raised unreasonable obstacles to worker organizations.⁹⁹ Subcontracted workers, like "permanent temporary" workers, lack employment stability.¹⁰⁰ Subcontracted workers do not have the legal rights to organize and collectively bargain with the companies and employers benefiting from their labor, despite the fact that these companies may determine their wages, benefits, and working conditions.¹⁰¹ These subcontracted workers are, instead, able to organize and negotiate collectively only with their subcontractors and not the company.¹⁰² Another obstacle employers frequently use is to place workers in groups of less than thirty workers, which avoid the thirty worker requirement by law to form a workers' organization.¹⁰³

The deterrent to unionize is so strong in Ecuador that the organization of banana workers has been significantly shut down.¹⁰⁴ The constitutionally and internationally protected right to freedom of association has been rendered a fiction for most banana workers

96. Human Rights Watch, *Summary*, *supra* note 15. See also Labor Code, Articles 169, 172, 180, available at <http://natlex.ilo.org/txt/S97ECU01.htm>.

97. Human Rights Watch, *Summary*, *supra* note 15.

98. Labor Code, Article 181, available at <http://natlex.ilo.org/txt/S97ECU01.htm>.

99. Human Rights Watch, *Summary*, *supra* note 15.

100. Human Rights Watch, *Summary*, *supra* note 15.

101. Human Rights Watch, *Summary*, *supra* note 15. ("Similarly, according to the Labor Code, an employer and that employer's intermediary hired to contract personnel to perform everyday company tasks share "joint responsibility" for the violation of "obligations to the worker.") See also Constitution, Article 35(11), available at <http://www.georgetown.edu/pdba/Constitutions/Ecuador/ecuador98.html>. See also Labor Code, Article 41, available at <http://natlex.ilo.org/txt/S97ECU01.htm>.

102. Human Rights Watch, *Summary*, *supra* note 15.

103. Human Rights Watch, *Summary*, *supra* note 15.

104. There are numerous examples of banana workers being fired for forming and joining unions. *BANANA WORKERS FIRED IN ECUADOR! Days after strike for a union, 120 workers fired!*, US/LEAP Action Alert, US/LEAP, 3-18-02, available at <http://www.usleap.org/Banana/Noboa/FiringAlert3-18-02.html>. If successful in forming unions, there have been examples of armed guards firing on union demonstrations. Juan Forero, *In Ecuador's Banana Fields, Child Labor Is Key to Profits*, The New York Times July 13, 2002, at A1.

in the sector.¹⁰⁵ As a result of the impediments to and risks in exercising the right to freedom of association, workers have successfully organized on only roughly five of the more than 5,000 registered banana plantations in Ecuador, and only approximately 1,650 of the 120,000 to 148,000 banana workers are affiliated with workers' organizations.¹⁰⁶ This lack of affiliation helps make Ecuador the world leader in banana exports and will only encourage Ecuador to continue social deregulations to keep production costs low in order to reach the expanded EU market.¹⁰⁷

B. Multinational Corporations

Since their creation at the end of the 19th Century, multinational companies succeeded in maintaining extremely high profit margins¹⁰⁸ by combining inexpensive overseas raw materials and labor markets with European and U.S. management and capital.¹⁰⁹ While there are legitimate arguments that foreign investment creates work that did not previously exist in developing countries,¹¹⁰ multinational banana producers tend to repatriate most of their profits to their countries of origin.¹¹¹ Only 12% of the final price stays in the producing countries, while an even smaller proportion goes to small farmers (5-10 per cent) or to plantation workers (1-2 per cent).¹¹² To produce large amounts of cheap, unblemished bananas to sell, the multinational companies favor very intensive

105. Human Rights Watch, *Summary*, *supra* note 15.

106. Human Rights Watch, *Summary*, *supra* note 15. The banana worker affiliation rate of Ecuador is far lower than that of Colombia or any Central American banana-exporting country. *See also* Bacon, *supra* note 82.

107. Human Rights Watch, *Summary*, *supra* note 15. *See also Consequences for Latin America*, Bananadrama 3, Consequence of Liberalization, Banana Link, available at http://www.bananalink.org.uk/trade_war/trade_war.htm.

108. Banana Link, Companies, *supra* note 23.

109. George V. Sherman, Jr., *In Defense of Multinational Corporations*, July 1-5, 2001, available at <http://bastiat.net/en/Bastiat2001/george.v.sherman.html>.

110. *Id.* *See also* Corporate Responsibility Report, Standards for Independent Banana Growers, Chiquita Brands International, Inc, available at <http://www.chiquita.com/chiquitacr1/4cases/cro72.asp>. *See also* Griswold & Lucas, *supra* note 26.

111. Banana Link, Companies, *supra* note 23.

112. Banana Link, Companies, *supra* note 23.

methods of production,¹¹³ using large volumes of fertilizers and pesticides to increase the amount of input.¹¹⁴ In a situation of over-supply, as was the case in 2000, prices paid to independent producers were systematically below production costs, forcing wages down.¹¹⁵

In recent years, these big companies have tried to free themselves of direct ownership of plantations, in favor of guaranteed supply contracts with medium- and large-scale producers in the countries where they operate.¹¹⁶ This tactic allows the multinational headquarters to avoid culpability for labor and environmental conditions and shifts this responsibility onto local producers by claiming to be only the buyers of these goods.¹¹⁷ The multinationals argue that the supplier plantations are private property over which they have no jurisdiction and that the decisions regarding labor matters are the prerogative of the landowners and therefore out of their hands.¹¹⁸ Although the governments are still the primary bodies accountable for upholding human rights everywhere, the multinationals are fully aware¹¹⁹ of the production methods and

113. Work on banana plantations exposes workers to pesticides so hazardous that the EPA bans them in the United States. Two of them, diazinon and chlorpyrifos, are sprayed on plastic sheets which workers use to wrap the bunches. The EPA cautions that they're especially dangerous to children, even in low doses. Both are organophosphates, originally developed as nerve gas agents in World War II. David Bacon, *Blood on the Bananas*, 6/12/02 available at http://www.kclabor.org/blood_on_the_bananas.htm.

114. See Banana Link, Companies, *supra* note 23. See also *Human and Environmental Impact*, Banana Link, *supra* note 81. ("The increase in exports from these regions in the past decades or so has been achieved mainly through increasing the amount of inputs (fertilizers and pesticides) and the area under cultivation.").

115. See Banana Link, Companies, *supra* note 23.

116. See Banana Link, Companies, *supra* note 23.

117. See Banana Link, Companies, *supra* note 23. See also *Tainted Harvest: Child Labor and Obstacles to Organizing on Ecuador's Banana Plantations*, Banana-Exporting Companies, Human Rights Watch, (April 2002), available at http://hrw.org/reports/2002/ecuador/ecuad0402-06.htm#P863_208237.

118. *Tainted Harvest: Child Labor and Obstacles to Organizing on Ecuador's Banana Plantations*, Banana-Exporting Companies, Human Rights Watch, (April 2002), available at http://hrw.org/reports/2002/ecuador/ecuad0402-06.htm#P863_208237.

119. See Corporate Responsibility Report, Standards for Independent Banana Growers, Chiquita Brands International, Inc., available at <http://www.chiquita.com/chiquitacr1/4cases/cro72.asp>. Chiquita states in this report that Ecuador's expansion has been fueled by lower labor, social, and environmental standard than are generally present in the rest of Latin America.

lack of union representation from the companies whom they benefit.¹²⁰ The responsibility of the multinationals for these human rights violations of banana workers is therefore inescapable.¹²¹

The failure of the Ecuadorian government to enforce its labor laws results in human rights abuse that underlies the production of millions of metric tons of bananas supplied to exporting corporations every year.¹²² This lack of sufficient legal protections for workers' rights allows banana producers to violate workers' rights with impunity.¹²³ Exporting corporations contract directly with these national producers and benefit from these violations by receiving bananas at almost half the market price,¹²⁴ produced under abusive labor conditions and by workers making barely enough to survive.¹²⁵ In fact, multinationals export over four million metric tons of Ecuadorian bananas annually, but have disclaimed any obligation to demand respect for workers' rights on third-party plantations from which they purchase bananas for export.¹²⁶

When labor rights abuses occurs on these plantations and exporting corporations fail to take remedial steps to ensure respect for workers' rights, multinationals not only facilitate the problems

120. Human Rights Watch, *Banana Exporting Companies*, *supra* note 118. See also Pierre Sane, *Why Human Rights Should Matter to the Business World*, UN Reform, (January 8, 2001) at <http://www.globalpolicy.org/reform/2001/0108ps.htm>.

121. Pierre Sane, *Why Human Rights Should Matter to the Business World*, UN Reform, (Jan. 8, 2001) at <http://www.globalpolicy.org/reform/2001/0108ps.htm>.

122. Human Rights Watch, *Summary*, *supra* note 15.

123. Human Rights Watch, *Banana Exporting Companies*, *supra* note 118.

124. "A 20 kilogram (43 pound) box of bananas sells in Ecuador for \$2 to \$3, and is worth \$25 in the United States or Europe." *Global Commodities: Bananas, Coffee*, Rural Migration News, October 2002, Volume 8 Number 4, at http://migration.ucdavis.edu/rmn/archive_rmn/oct_2002-20rmn.html. See also Andrew Bounds, *Banana Wars*, Latin Trade, (June 2001), at <http://www.uwec.edu/geography/Ivogeler/w111/articles/BananaWars.htm>. Ecuador is selling below cost, at around \$1.50 for a 42-pound box. Costa Rican bananas, by comparison, cost \$4.40 a box to produce and sell for about a dollar more (\$5.50).

125. The average salary of Ecuadorian Banana workers amounted to only \$5.44 a day with no insurance. The result is that two working adults in a family of four often make less than the almost \$300 a month that Ecuador's labor ministry estimates is the basic cost of living in the banana-producing region. Jim Lobe, *Labor Abuses Rampant in Banana Plantations*, OneWorld US, (April 25, 2002) at <http://www.corpwatch.org/news/PND.jsp?articleid=2409>.

126. *Id.* See also Report of the 1st Sess. of the Intergovernmental Group on Bananas and on Tropical Fruits, FAO Comm. On Commodity Problems, 63rd Sess. U.N. Doc. CCP BA/TF 99/17. See also Human Rights Watch, *supra* note 118.

but also benefit from these violations.¹²⁷ The reality is that governments, such as Ecuador, see multinationals as not only providing benefits to the economy of the host nation but also providing benefits to the political leadership who is credited with the growth in the overall economy of the nation.¹²⁸ These governments compete for multinational favors¹²⁹ by offering them short-term advantages. In exchange, these governments hope that acceleration in national development will soon follow.¹³⁰ The wholesale giants who are daily gaining greater control over the terms of trade need to accept culpability for labor and environmental conditions and break this damaging cycle of competition if they want real credibility as responsible corporate citizens.¹³¹

IV. WHAT IS THE ANSWER?

The biggest beneficiaries of the WTO Settlement, the Ecuadorian government and the US multinationals, are also the groups most responsible for the failure of banana workers to have a right to association.¹³² The legislation needed to solve these problems, although ambiguous, is already in place in Ecuador.¹³³ However, the entity enforcing this legislation is the Ecuadorian government, which has repeatedly neglected to strictly enforce the portions of their law that guarantee workers the right to organize.¹³⁴ The mul-

127. Human Rights Watch, *Summary*, *supra* note 15.

128. See *History of the Global Corporation*, Global Links Consulting, available at <http://www.globallinksconsulting.com/Global%20Inc/pgs/hist.html>.

129. An example of the advantages given to multinationals is reduced labor and production cost. Because of the non-union labor of Ecuador, the country is selling below cost, at around \$1.50 for a 42-pound box. Costa Rican bananas, by comparison, cost \$4.40 a box to produce and sell for about a dollar more (\$5.50). Andrew Bounds, *Banana Wars*, *Latin Trade*, (June 2001), available at <http://www.uwec.edu/geography/Ivogeler/w111/articles/BananaWars.htm>. The result is a shift in much of big 3 multinationals (Chiquita (United Brands), Dole Farming Company, and Del Monte) production to Ecuador, which is now the world's largest exporter. David Bacon, *Labor-Ecuador: U.S. Groups Condemn Abuses on Banana Plantations*, Internal Press Service, available at http://www.house.gov/schakowsky/article_06_20_02ecuadorbananas.html.

130. Global Links Consulting, *supra* note 128.

131. Banana Link, Companies, *supra* note 23.

132. Banana Link, *supra* note 23.

133. See Labor Code, *supra* note 86.

134. See *US/LEAP Comments Regarding Eligibility Criteria for Ecuador for ATPDEA Trade Benefits*, US/LEAP, September 16, 2002, at <http://www.usleap.org/Banana/ATPDEAComments9-16-02.html> (Stating "The fact that the Alamos plantations are

tinationalals also have administrative standards in place that would solve these problems.¹³⁵ Unfortunately, these standards are not currently being enforced because of a lack of accountability on the part of these companies.¹³⁶

The right to form unions is also guaranteed by other international treaties.¹³⁷ Without the right to form unions, other human rights violations are inevitable and will likely go unpunished.¹³⁸ Although changes in the Ecuadorian government's treatment of its banana workers may soon come with the election of a new president,¹³⁹ the U.S. judicial and legislative system can serve as the cata-

owned by Ecuador's largest banana company, the Noboa Corporation, run by the country's most prominent businessman, makes this high-profile case a key one for assessing respect for worker rights in Ecuador. If the Alamos workers are denied their right to organize and bargain collectively and if those responsible for the violence against them are not prosecuted in the wake of the Human Rights Watch report, a U.S. congressional staff delegation, and significant media attention, banana workers throughout the country will know that Ecuador lacks the political will to enforce criminal and labor law and ensure respect for worker rights in the country's largest industry.”).

135. E.g., *SAI8000: Overview of SA8000*, Social Accountability International, at <http://www.cepaa.org/SA8000/SA8000.htm>. See also *SAI8000*, Social Accountability International at <http://www.cepaa.org/Document%20Center/2001StdEnglishFinal.doc>. (“The first standard to be fully operational is Social Accountability 8000 (SA8000), a workplace standard that covers all key labor rights and certifies compliance through independent, accredited auditors. This standard specifies requirements for social accountability to enable a company to: a) develop, maintain, and enforce policies and procedures in order to manage those issues which it can control or influence; b) demonstrate to interested parties that policies, procedures and practices are in conformity with the requirements of this standard. The requirements of this standard shall apply universally with regard to geographic location, industry sector and company size”).

136. Human Rights Watch, *Banana Exporting Companies*, *supra* note 118.

137. International Covenant on Civil and Political Rights, *supra* note 74; International Covenant on Economic, Social and Cultural Rights, *supra* note 76; ILO Convention concerning Freedom of Association and Protection of the Right to Organize, *supra* note 79.

138. AFL-CIO, *supra* note 73.

139. Former coup leader Lucio Gutierrez, viewed as a crusader against corruption, won Ecuador's presidential runoff November 24, 2002, defeating billionaire businessman Alvaro Noboa, head of the Noboa Banana Company. Monte Hayes, *Corruption fighter wins presidential vote*, Associated Press, (Nov. 25, 2002), at A11, available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A34372-2002Nov24¬Found=true>.

lyst that banana workers need to begin the necessary process of social change required.¹⁴⁰

A. *U.S. to the Rescue*

The Ecuadorian banana workers should bring suit against the participating U.S. multinationals in U.S. courts. The Alien Tort Claims Act (ATCA)¹⁴¹ allows a foreign plaintiff to bring suit against U.S. defendants.¹⁴² In *John Doe I v. Unocal Corp.*, the court of appeals determined that no state action was required in order for the oil companies to be liable for the alleged violations under the ATCA.¹⁴³ There was sufficient evidence to preclude summary judgment with respect to whether the oil companies aided and abetted the military in subjecting the villagers to forced labor, murder, and rape.¹⁴⁴

The denial of the right to organize is a violation of several international laws, all of which have been signed by the United States.¹⁴⁵ Multinational corporations may think they have relative impunity because they are not the direct employers of the workers

140. An example of the slow process of change is that after over 11 months of harassment, firings, and two brutal violent attacks on striking workers, striking banana workers on the Los Alamos Plantation in Ecuador ended their struggle on November 28, 2002 and returned to work under terms of an agreement that won them health benefits and medical care for injuries resulting from attacks on May 16, 2002, but little else. Despite significant pressure on Alvaro Noboa, owner of the plantation's management refused to negotiate a collective bargaining agreement to improve wages and working conditions. *Noboa Workers Reinstated, Win Medical Benefits. New Campaign Begins*, US/LEAP Action Alert, US/LEAP, (Dec. 13, 2002), available at <http://www.usleap.org/Banana/bananatemp.html#noboa>.

141. 28 USCS § 1350 – District Court shall have original jurisdiction of any civil action for a tort only committed in violation of the law of nation or a treaty of the United States.

142. *John Doe I v. Unocal Corp.*, 2002 U.S. App. LEXIS 19263 (9th Cir. Sept. 18, 2002).

143. *Id.* at 32.

144. *See id.* at 58 (“The crimes of forced labor, murder, and rape were considered *jus cogens* violations. *Jus cogens* violations are violations of norms of international law that are binding on nations even if they do not agree to them.”).

145. *See also* International Covenant on Civil and Political Rights, *supra* note 74; International Covenant on Economic, Social and Cultural Rights, *supra* note 76; *See also Status of Ratifications of the Principal International Human Rights Treaties*, Office of the United Nations High Commissioner For Human Rights, (Nov. 2, 2003) available at <http://www.unhchr.ch/pdf/report.pdf>. (U.S. ratified the ICCPR on Sept. 8, 1992 and the ICESCR on Oct. 5, 1977).

and they are not directly denying the workers their rights.¹⁴⁶ However, in order to qualify as aiding and abetting under international criminal law, assistance need not constitute an indispensable element, that is, a *sine qua non*¹⁴⁷ for the acts of the principal.¹⁴⁸ Rather, it suffices that the acts of the accomplice have a substantial effect on the commission of the criminal act by the principal.¹⁴⁹ The acts of the accomplice have the required substantial effect where the criminal act most probably would not have occurred in the same way without someone acting in the role that the accomplice in fact assumed.¹⁵⁰

In *Doe v Unocal Corp.*, Unocal had a 28% interest in the Myanmar Oil Project (the Project) to produce, transport and sell natural gas from deposit in Myanmar.¹⁵¹ Unocal had knowledge that the Myanmar military provided security and other services for the Project.¹⁵² Unocal was also made aware, several times and by several different methods, of the Myanmar military's use of forced labor and of the other human rights violations that the military employed in connection with the Project.¹⁵³ Despite having this knowledge, Unocal chose to listen to the assurance of the Myanmar military that no human rights abuses were occurring in the area of pipeline construction.¹⁵⁴ Unocal and its partner in the project, To-

146. Human Rights Watch, *Banana Exporting Companies*, *supra* note 117.

147. *Sine qua non* (see-nay kwah nahn) prep. Latin for "without which it could not be," an indispensable action or condition. Example: if Charlie Careless had not left the keys in the ignition, his 10-year-old son could not have started the car and backed it over Polly Playmate. So Charlie's act was the *sine qua non* of the injury to Playmate.

148. *See Doe I v. Unocal Corp.*, 2002 U.S. App. LEXIS 19263, at 45-46 (9th Cir. 2002).

149. *Id.* at 46.

150. *Id.* at 46.

151. *Id.* at 4. Burma had been ruled by a military government since 1958. In 1988, a new military government took control and renamed the country Myanmar.

152. *Id.* at 6.

153. *Id.* at 12-20. ("Several Plaintiffs testified that the Myanmar military subjected them to act of murder, rape and torture. Unocal was informed by its own employee, consultants, by partners in the project and by human rights organizations, that the Myanmar military was using forced labor and committing other human rights violations in connection with the Project. In fact, in December 11, 1995, Unocal Consultant John Hasselman reported to Unocal that the military's most common human rights violations are 'forced relocation without compensation of families from land near/along the pipeline; forced labor to work on infrastructure projects supporting the pipeline. . . ; and imprisonment and/or execution by the army of those opposing such actions.'").

154. *Unocal*, 2002 U.S. App. LEXIS 19263, at 20-21.

tal, made the statement that even if forced labor were being used, they did not have a responsibility to monitor the military's behavior.¹⁵⁵ This evidence was enough for the district court to hold that a reasonable fact finder could find Unocal's conduct met the standard for aiding and abetting.¹⁵⁶

The denial of union association and the use of forced labor are both violations of the Universal Declaration of Human Right as well as a number of other international treaties.¹⁵⁷ In *Doe v. Unocal*, the court recognized that crimes of this nature, that are so widely condemned, reach the status of a *jus cogens*¹⁵⁸ and therefore do not require state action to fall under the ATCA.¹⁵⁹ Multinationals in Ecuador continue to aid and encourage banana producers to violate human rights of workers by accepting bananas from these producers,¹⁶⁰ despite having full knowledge of these crimes.¹⁶¹ Similar to the corporate defendant in *Doe v. Unocal*, multinationals have knowledge of the crimes, yet they deny culpability for these crimes from which they profit.¹⁶² Because these violations of human rights would mostly likely not occur if the banana producers where not trying so desperately to increase production for multinational favor, the Ecuadorian workers would have a cause of action under the ATCA that would probably survive summary judgment.¹⁶³

155. See *id.* at 6.

156. *Id.* at 10.

157. ILO Convention concerning Freedom of Association and Protection of the Right to Organize, *supra* note 79; Universal Declaration of Human Rights, *supra* note 79.

158. *Unocal*, 2002 U.S. App. LEXIS 19263 at 40 ("*Jus cogens* violations are violations of norms of international law that are binding on nations even if they do not agree to them"). See also *S & Davis Int'l, Inc. v. Yemen*, 218 F.3d 1292, 1301 (11th Cir. 2000). ("Interpreting § 1605(a)(1), the Supreme Court held 'we [do not] see how a foreign state can waive its immunity under § 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States.'").

159. *Unocal*, 2002 U.S. App. LEXIS 19263 at 8.

160. See *Banana Link, Companies*, *supra* note 23; Human Rights Watch, *Banana Exporting Companies*, *supra* note 118; Human Rights Watch, *Summary*, *supra* note 15. (Explaining that despite receiving over 85% of the profits from the exporting of over 4 million metric tons of bananas, multinationals still do not accept culpability for the human rights violations of banana workers in Ecuador).

161. See *Corporate Responsibility Report*, *supra* note 119.

162. See *Human Rights Watch, Banana Exporting Companies*, *supra* note 118. See also *Unocal*, 2002 U.S. App. LEXIS 19263 at 5.

163. See *Unocal*, 2002 U.S. App. LEXIS 19263 at 26.

The workers may also be able to sue the country of Ecuador itself, even though the U.S. courts usually do not allow plaintiffs to sue a foreign nation.¹⁶⁴ However, if the nation falls into one of the several exceptions,¹⁶⁵ then jurisdiction becomes proper for the foreign state and the U.S. court is allowed to decide the case.¹⁶⁶ Ecuador possibly falls under at least one of the exceptions of the Foreign Sovereign Immunities Act listed in 28 USC § 1605. Under Section (a)(2),¹⁶⁷ a foreign state shall not be immune from jurisdiction of courts of the United States in any case in which the action is based on an act outside the U.S. in connection with a commercial activity¹⁶⁸ of the foreign state elsewhere and that act causes a direct effect¹⁶⁹ in the United States.¹⁷⁰ For example in *S & Davis Int'l, Inc. v. Yemen*, the commercial activity was a contract for the foreign state's purchase of grain from a private U.S. dealer, where the for-

164. See 28 U.S.C.S. § 1330 (2003) (stating that "under the Foreign Sovereign Immunities Act, 1602, a district court has jurisdiction over a civil action against a foreign state—including its political subdivisions, agencies, or instrumentalities—only if one of several exceptions to foreign sovereign immunity applies").

165. See 28 USC § 1605 (2003). ("General exceptions to the jurisdictional immunity of a foreign state (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case— (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.").

166. *Id.*

167. *S & Davis Int'l, Inc. v. Yemen*, 218 F.3d 1292, 1301 (11th Cir. 2000). ("Interpreting § 1605(a)(1), the Supreme Court held 'we [do not] see how a foreign state can waive its immunity under § 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States.'").

168. 28 U.S.C. § 1603(d) (2003). ("A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.").

169. See *Davis*, 218 F.3d at 1298 (Stating that "the 'direct effects' component of the commercial activity exception to sovereign immunity is inextricably intertwined with the 'minimum contacts' component of the personal jurisdiction issue. . .").

170. 28 U.S.C. § 1605 (a) (2). See also *Davis*, 218 F.3d at 1302 ("Stating 'import-export transactions involving sales to, or purchases from, concerns in the United States' are included within the conduct of the first clause of § 1605(a)(2) and defining commercial activity under § 1603(d) to include 'a single contract, if of the same character as a contract which might be made by a private person'").

eign government agency "was more involved than a mere regulator, and whose directives, not based upon regulatory reasons, controlled" the foreign corporations actions.¹⁷¹ Thus, because the court considers the contract for the purchase of grain a commercial activity, the production and selling of bananas in Ecuador to U.S. consumers could also be considered a commercial activity.

However, the actual violation of a failure to protect the banana workers' right to organize is not likely to be viewed as a commercial activity by the Supreme Court.¹⁷² The Supreme Court held in *Saudi Arabia v. Nelson* that "a state engages in commercial activity where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns."¹⁷³ In *Nelson*, although the Saudi Government subjected Nelson to the abuse alleged as retaliation for his persistence in reporting hospital safety violations, Nelson argued that "the character of the mistreatment was consequently commercial."¹⁷⁴ However, the Supreme Court stated that "this argument does not alter the fact that the powers allegedly abused by the Saudi government were those of police and penal officers."¹⁷⁵

Ecuadorian workers can argue that the government's lack of enforcement of its Labor Codes keeps the cost of its bananas low and is in character a commercial activity.¹⁷⁶ However, like the Saudi government's actions in *Nelson*, this action (or non-action) is a power peculiar to a sovereign state.¹⁷⁷ Therefore, it seems unlikely that Ecuador would fall under one of the exceptions to the Sovereign Immunity Act by not enforcing its labor codes and protecting its banana workers' rights to form unions.¹⁷⁸

171. *Davis*, 218 F.3d 1292, 1303.

172. See *Saudi Arabia v Nelson*, 507 U.S. 349 (1993). Action brought against Kingdom of Saudi Arabia by American citizens employed at Saudi hospital, based on alleged personal injuries resulting from unlawful detention and torture by Saudi Government, was not "based upon a commercial activity."

173. *Id.* at 360.

174. *Id.* at 363.

175. *Id.* at 364.

176. See *Global Exchange*, *supra* note 83; see *Bounds*, *supra* note 124; see *Lobe*, *supra* note 125.

177. *Nelson*, 507 U.S. 349.

178. *Id.*

The likelihood that Ecuadorian banana workers who barely make enough money to survive will have enough money to bear the cost of a lengthy litigation process against huge multinationals is highly improbable.¹⁷⁹ The most plausible solution by the U.S. would be to use its trade policy leverage to oblige Ecuador into changing its legislation and foreign policies. The United States has a history of enacting legislation, such as sanctions (either boycotts or embargoes),¹⁸⁰ that encourage changes in the governments of foreign countries that are not in agreement with U.S. policies.¹⁸¹

When looking at the fact that the U.S. imports approximately 25% of Ecuador's total banana exports,¹⁸² the affect of a U.S. embargo against Ecuadorian bananas becomes apparent.¹⁸³ Also, the U.S. could enact narrowly targeted trade sanctions or blocking trades with multinationals that have been shown to engage in busi-

179. See Lobe, *supra* note 125. See also Unocal 2002 U.S. App. LEXIS 19263. The original claim for this case was filed in Central District Court of California in September of 1996. The Ninth Circuit Court of Appeals did not hear and decide on the Plaintiff's appeals until December 3, 2001.

180. Sanction are any inducement to individuals or groups to follow or refrain from following a particular course of conduct. Sanctions may include boycotts or embargoes. Available at <http://www.encyclopedia.com/html/si/sanction.asp>.

181. Micheal Paulson, *History of U.S. Sanction shows most haven't worked*, Seattle Post-Intelligencer, (May 11, 1999), available at <http://seattlepi.nwsource.com/iraq/sanction.shtml>. ("Sanctions played a role in helping to force the apartheid government of South Africa to allow democratic elections, and State Department officials claim economic sanctions helped force Serbia to the negotiating table over the war in Bosnia and limited Iraq's ability to rebuild its military after the 1991 Gulf War. A recent study by the Center for Strategic and International Studies cited three other successes: blocking the Russian transfer of sophisticated cryogenic rocket engines to India after trade sanctions were threatened in July 1993; halting South African arms shipments to Syria after a U.S. threat to withhold aid in January 1997, and imposing targeted sanctions against China to cease exports of sensitive military equipment.").

182. See *Banana Statistics*, Food and Agriculture Organization of the United Nations, 2nd Sess., Committee On Commodity Problems, Intergovernmental Group on Bananas and on Tropical Fruits, U.N. Doc. CCP: BA/TF 01/2 (Rev 1.), available at http://www.fao.org/es/ESC/common/ecg/28387_en_banantabrev2001.pdf. Ecuador exports 3.942 Million tons of bananas, while the U.S. imports .839 million ton of Ecuador's bananas.

183. *Id.* See also Daniel T. Griswold and Aaron Lukas, *Cato Handbook for the 106'th Congress, Chapter 56, Trade Sanctions*, pg. 555, available at <http://www.freetrade.org/pubs/handbook/hb106-56.pdf> ("There is a raft of countries subjected to more specific sanctions, responding to a particular behavior, and barring a particular import or a certain type of government assistance.") See also Paulson, *supra* note 181 ("For instance, Gambia and Burundi have been denied money from the Overseas Private Investment Corp. because of military coups there.").

ness with Ecuadorian plantations that are violating human rights.¹⁸⁴ Although the sanctions would encourage change by both the multinationals and the Ecuadorian government, there has been a strong movement to eliminate U.S. embargoes because of the harmful effect they have on the U.S. economy and the poor and vulnerable people of the target countries.¹⁸⁵

Another method of persuasion could be eliminating aid and benefits to Ecuador.¹⁸⁶ Suspending bilateral aid and benefits are viable ways to signal strong disapproval of the actions of foreign governments.¹⁸⁷ A failed example of the type of action that the U.S. could have used was demonstrated under the U.S. Andean Trade Promotion and Drug Eradication Act (ATPDEA).¹⁸⁸ On September 25, 2002, the United States granted ATPDEA benefits to Bolivia, Colombia and Peru, but not Ecuador.¹⁸⁹ According to the Act, before granting ATPDEA benefits, the United States must take into account "the extent to which the country provides internationally recognized worker rights, including. . . the right of association; the right to organize and bargain collectively."¹⁹⁰

184. See Daniel T. Griswold and Aaron Lukas, *Cato Handbook for the 106th Congress*, Chapter 56, *Trade Sanctions*, pg. 562, available at <http://www.freetrade.org/pubs/handbook/hb106-56.pdf>.

185. *Id.* at 555, 562.

186. See *id.* at 561. (Cutting U.S. aid to foreign nations is not a trade sanction).

187. See *id.* at 561.

188. United States Bureau of Customs and Border Protection, *Andean Trade Promotion and Drug Eradication Act Implementation Instructions for Non-Textile Products* (Nov. 7, 2002), available at <http://www.customs.ustreas.gov/impexpo/atpdea.htm>. ("The Trade and Development Act of 2002 ("the Act"), was signed into law on August 6, 2002. Title XXXI of the Act concerns the renewal and expansion of the Andean Trade Preference Act (ATPA) and is entitled the 'Andean Trade Promotion and Drug Eradication Act' (the ATPDEA). The ATPDEA immediately restored duty free treatment to articles that had been eligible for ATPA benefits prior to the program's expiration on December 4, 2001."). See also, Trade Act of 2002, Pub. L. No. 107-210, 2002 HR 3009.

189. *Ecuador: U.S. Caves on Labor Rights*, Human Rights Watch (New York), Nov. 7, 2002 available at <http://hrw.org/press/2002/11/ecuadorlabor1107.htm>.

190. *Id.* See also Gibson, Dunn & Crutcher LLP, *President Bush Signs Trade Promotion Authority ("Fast Track") Bill, Renewal of the Andean Trade Preference Act*, available at <http://www.gdclaw.com/practices/publications/detail/id/623/%3FpubItemId%3D6469>. ("Title XXXI of the Trade Act of 2002, the Andean Trade Promotion and Drug Eradication Act, renews the Andean Trade Preference Act. The renewal is retroactive to December 4, 2001, the date the Andean Trade Preference Act expired. The Andean Trade Preference Act extends preferential duty-free treatment to a large number of products exported to the U.S. from Bolivia, Colombia, Ecuador and Peru, including a

At the time, Ecuador faced considerable international pressure to investigate the anti-union violence on the Noboa Corporation's Los Alamos banana plantations.¹⁹¹ The inadequacy of Ecuadorian labor law protecting the right to organize, the right to bargain collectively, and the failure of the system to ensure the basic rights of the Alamos workers called into serious question the country's eligibility for ATPDEA designation.¹⁹² Prior to the signing of the agreement, Ecuador made several general commitments to the United States to improve deficient labor law enforcement and review laws on freedom of association that unfortunately fell far short of international standards.¹⁹³

The United States granted Ecuador enhanced trade benefits under the U.S. ATPDEA on October 31, 2002, even though Ecuador failed to comply with the Act's labor rights requirements.¹⁹⁴ Despite the failure to fully encourage improvement of working conditions of Ecuadorian banana workers, these actions prove that the U.S. has not only the ability but opportunity to influence Ecuador to change its labor laws for the better.¹⁹⁵

number of products previously excluded from the preference program, such as textiles and apparel products. The Andean Trade Promotion and Drug Eradication Act sets forth a number of factors that the President must take into account when deciding whether to extend preferential treatment to any country under the Andean Trade Preference Act, including steps taken by the country to comply with World Trade Organization obligations, to protect workers' rights, and to combat corruption.").

191. Human Rights Watch, Ecuador, *supra* note 189.

192. *US/LEAP Comments Regarding Eligibility Criteria for Ecuador for ATPDEA Trade Benefits*, US/LEAP, September 16, 2002. Available at <http://www.usleap.org/Banana/ATPDEAComments9-16-02.html>.

193. *Id.* See also Human Rights Watch, Ecuador, *supra* note 189.

194. See Human Rights Watch, Ecuador, *supra* note 189.

195. See Gibson, Dunn & Crutcher LLP, *President Bush Signs Trade Promotion Authority ("Fast Track") Bill, Renewal of the Andean Trade Preference Act*, available at <http://www.gdclaw.com/practices/publications/detail/id/623/%3FpubItemId%3D6469>.

("Today President George W. Bush signed into law the Trade Act of 2002, an omnibus trade bill that grants the President the authority to negotiate international trade agreements subject to a single 'yes' or 'no' vote by Congress without amendments. The Trade Act of 2002 also provides trade adjustment assistance for U.S. workers displaced by foreign trade, renews and expands the Andean Trade Preference Act, and renews the U.S. Generalized System of Preferences.

Trade promotion authority, formerly known as "fast track" authority, authorizes the President to negotiate international trade agreements that Congress can accept or reject, but not amend. Trade promotion authority had been granted to five former presidents until it expired in 1994. Title XXI of the Trade Act of 2002, the Bipartisan

B. Ecuador's Government

Ecuador should amend and enforce its labor codes to protect banana workers and become more directly involved with the banana exporting process to help control the banana market to produce a stable income source for workers.¹⁹⁶ Ecuador has several options to remedy this problem. Ecuador could amend the Labor Code to require the reinstatement of permanent workers fired for engaging in union activity and payment of wages lost during the period when the workers were wrongfully dismissed.¹⁹⁷ Where reinstatement is impossible, compensation for dismissal should be substantially higher than for other illegal terminations.¹⁹⁸

The Labor Code should also provide that temporary workers and workers with project contracts who are fired for exercising the right to freedom of association have the right to reinstatement until the conclusion of their short-term contracts and payment of any lost wages incurred during the period of wrongful dismissal.¹⁹⁹ If reinstatement is not possible, those workers who were dismissed should be substantially rewarded for their anti-union dismissal.²⁰⁰ The labor law should also explicitly prohibit anti-union discrimination in hiring and employers from interfering in the establishment or functioning of workers' organizations, as prohibited by the ILO.²⁰¹

Trade Promotion Authority Act of 2002, reinstates trade promotion authority, subject to a number of conditions.”).

196. See Ramon L. Espinel, *The Banana Problem in Ecuador: A Regulation Proposal*, available at http://www.sica.gov.ec/ingles/cadenas/banano/docs/regulation_proposal.pdf. See also US/LEAP, *supra* note 192. See also Human Rights Watch, *supra* note 15.

197. US/LEAP, *supra* note 192.

198. *Tainted Harvest: Child Labor and Obstacles to Organizing on Ecuador's Banana Plantations, Specific Recommendations*, Human Rights Watch, (April 2002), http://www.hrw.org/reports/2002/ecuador/ecuad0402-08.htm#P1032_262378.

199. *Id.*

200. *Id.*

201. US/LEAP, *supra* note 192. See also The International Labour Organization, *About the ILO*, available at <http://www.ilo.org/public/english/about/index.htm>. (“The International Labor Organization (ILO). The International Labor Organization is the UN specialized agency which seeks the promotion of social justice and internationally recognized human and labor rights. It was founded in 1919 and is the only surviving major creation of the Treaty of Versailles which brought the League of Nations into being and it became the first specialized agency of the UN in 1946. The ILO formulates international labor standards in the form of Conventions and Recommendations setting minimum standards of basic labor rights: freedom of association, the right to

Ecuador could also become more directly involved with the banana exporting process.²⁰² The price of Ecuadorian bananas is significantly lower than other exporting countries.²⁰³ If Ecuador adopts the necessary regulatory changes it can establish international marketing conditions of its banana production.²⁰⁴ To avoid price decrease more than what the cyclical market imposes, the country can discriminate prices according to those markets where it sells.²⁰⁵ A price must be allocated to each market, so that exporters can agree with producers how much they are going to buy for each market and a price will automatically be established.²⁰⁶ By making prices more stable for the producer, it brings a higher and more consistent profit margin to producers, thereby alleviating the pressure to keep workers from forming unions for their benefit.

C. *Multinationals*

Dole and Chiquita are both major corporations who export large quantities of Ecuadorian bananas.²⁰⁷ Both corporations are also signatory members of the workplace code of conduct SA8000.²⁰⁸ They should therefore fulfill their public commitment

organize, collective bargaining, abolition of forced labor, equality of opportunity and treatment, and other standards regulating conditions across the entire spectrum of work related issues.") See also ILO Convention, *supra* note 79.

202. See Ramon L. Espinel, *The Banana Problem in Ecuador: A Regulation Proposal*, available at http://www.sica.gov.ec/ingles/cadenas/banano/docs/regulation_proposal.pdf.

203. ("Ecuador is the world's largest exporter of bananas and has been increasing its market share by selling bananas at a significantly lower price than exporters in Central America."). US/LEAP, *Banana Update: Global Banana Crisis Threaten Central American Unions and Wages*, (Dec. 13, 1999) available at <http://www.usleap.org/Banana/crisis/CrisisThreat12-99.html>.

204. *Id.*

205. *Id.*

206. *Id.*

207. Human Rights Watch, *supra* note 198.

208. SA8000, Social Accountability International, available at <http://www.cepaa.org/> ("The first standard to be fully operational is Social Accountability 8000 (SA8000), a workplace standard that covers all key labor rights and certifies compliance through independent, accredited auditors. This standard specifies requirements for social accountability to enable a company to: a) develop, maintain, and enforce policies and procedures in order to manage those issues which it can control or influence; b) demonstrate to interested parties that policies, procedures and practices are in conformity with the requirements of this standard. The requirements of this standard shall

to monitor labor conditions on third-party supplier plantations,²⁰⁹ begin to bring all suppliers into compliance with Ecuadorian labor law and SA8000 standards as soon as possible and at least within the reasonable period of 180 days, and report publicly on such efforts on at least an annual basis.²¹⁰

Chiquita should ensure that all external agreements negotiated with trade union bodies or other third parties that address labor rights on Chiquita's supplier plantations, like the "IUF/COLSIBA and Chiquita Agreement on Freedom of Association, Minimum Labor Standards and Employment in Latin American Banana Operations,"²¹¹ meet or exceed the standards set forth in the company's internal code of conduct.

V. CONCLUSION

The right to freedom of association is one of the principles in which this country was founded.²¹² Although this was a fundamental right given by the Constitution, history shows U.S. that this right was not always guaranteed and that this right was solidified only through the fight and hard work of many men and women.²¹³ History also shows that without the help of unions and the right to free

apply universally with regard to geographic location, industry sector and company size.").

209. Human Rights Watch, Specific Recommendations, *supra* note 198.

210. Human Rights Watch, Specific Recommendations, *supra* note 198.

211. *IUF/COLSIBA and Chiquita Agreement on Freedom of Association, Minimum Labor Standards and Employment in Latin American Banana Operations*, IUF, available at <http://www.citinv.it/associazioni/CNMS/archivio/lavoro/chiquitaagreement.pdf>.

212. U.S. CONST, amend. I.

213. See *The Pullman Strike, Chicago, 1894*. Available at <http://www.cc.ukans.edu/kansas/pullman/index.html>. The Pullman strike of 1894 was the first national strike in the United States. It involved over 150,000 person and twenty-seven states and territories and would paralyze the nations railway system. In supporting the capital side of this strike, President Cleveland sent federal troops, who would fire and kill up to 20 U.S. citizens and wounding another 20, all against the wishes of the states. The federal court of the nation outlawed striking by the passing of the Omnibus indictment. This blow to unionized labor would not be struck down until the passing of the Wagner act in 1935.

See also Hansen, Curtis, *The Battle of the Overpass*. Available at <http://www.reuther.wayne.edu/exhibits/battle.html>. This was another example of the early struggles of unions. The Battle of the Overpass is one of the most famous events in the history of the American labor movement. This set in motion the series of event, which after four year of efforts, resulted in a crippling at the Rouge Plant, the successfully NLRB election and final recognition of the UAW by Ford Motor Company, in May 1941.

association (to strike), American workers would not have secured fair wages and decent working conditions.²¹⁴ We now celebrate the first labor unions' efforts through the national holiday Labor Day, but it seems as though we have forgotten the hard work and struggle involved in achieving better working conditions and fair wages.²¹⁵ By extending U.S. Trade benefits to Ecuador, we are actually encouraging the same problems that our forefathers worked so hard to alleviate in our own country.²¹⁶ While the U.S. may not be able to completely alleviate the situation, it does have the power to thoroughly discourage it.²¹⁷ Although the recent extension of trade benefit to Ecuador is a step backwards, it should not be the final step. Hopefully, those fighting in the U.S.²¹⁸ for Ecuador can one day convince others that in taking a stand for Ecuador's banana workers, they are actually taking stand for the American worker.

These two situations are very similar to the legal non-violent strike on the Los Alamos plantations in May of 2002. *See supra* note 3.

214. Rico Villanueva Siasoco, *Hard Labor: How unions fought to honor the American Worker*, available at <http://www.infoplease.com/spot/labor1.html>.

215. *Id.*

216. *Id.*

217. *See* Paulson, *supra* note 181.

218. Lawmakers were urging the USTR not to extend new trade benefits to Ecuador until it meets basic labor standards and protections. Letter from George Miller, Member of Congress, 7th District, California & Janice D. Schakowsky, Member of Congress, 9th District, Illinois to Robert B. Zoellick, Ambassador, United States Trade Representative (Sept. 23, 2002) available at <http://edworkforce.house.gov/democrats/tradelaborletter.html>.